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6 Attorneys for Third Parties
7 THEODORE KRAMER and
8 THOMAS SCARAMELLINO

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SAN MATEO

11
12 **Six4Three**, a Delaware limited liability
13 company,

14 Plaintiff;

15 v.

16 **Facebook, Inc.**, a Delaware corporation;
17 **Mark Zuckerberg**, an individual;
18 **Christopher Cox**, an individual; **Javier**
19 **Olivan**, an individual; **Samuel Lessin**, an
20 individual; **Michael Vernal**, an individual;
21 **Ilya Sukhar**, an individual; and **Does 1–50**,
22 inclusive,

23 Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dep't 23

DECLARATION OF THOMAS SCARAMELLINO

Date: February 22, 2018
Time: 9:00 a.m.
Department: 23

Action Filed April 10, 2015
Trial Date: None set

1 I, Thomas Scaramellino, declare under penalty of perjury as follows.

2 1. My name is Thomas Scaramellino. I am over the age of 18. I make these
3 statements in support of modifying the Court's Order of February 7, 2019 requiring my personal
4 appearance at the hearing to be held on February 22, 2019. I have personal knowledge of the
5 matters stated in this declaration, and I believe those matters to be true.

6 2. I am a software executive and investor. I am currently a Director of TallyGo, Inc.,
7 a navigation software startup, and have previously held roles as CEO or Director of other
8 software startups, all of which have been headquartered in New York, Boston or Los Angeles. In
9 my role as a software executive and investor, I advise and invest in other software startups
10 through limited liability syndicate investment vehicles, a common practice in the software
11 investment community.

12 3. One of these syndicate investment vehicles, #2 LLC, an investment entity located
13 exclusively in New York, invested in six4three, LLC ("643" or "Plaintiff") in late 2012 and 2013
14 to build a computer vision software business. In conjunction with #2 LLC's investment, I agreed
15 to serve as a business advisor to 643. #2 LLC has no offices in California, no representative, no
16 phone, no fax, no mailbox, and no presence whatsoever there. I currently reside in New York.

17 4. Since 643's inception, Facebook has engaged in conduct that harmed 643 and
18 which had anti-competitive and exclusionary motives. Further, during the course of 643's
19 software development, I was informed by 643's founders that Facebook ignored the privacy
20 controls users set on their data when Facebook sent the data through its application program
21 interfaces ("APIs"), and that 643 required additional funding in order to build work-arounds that
22 would enable 643 to respect user privacy. I found this to be extremely concerning and expressed
23 my reservations to 643's founders, who invested significant capital and labor in attempting to
24 respect user privacy on the Facebook Platform. I also tried to raise this issue with Facebook, but
25 Facebook's representative refused to communicate with me.

26 5. Moreover, in April 2015, Facebook made significant changes to the various APIs
27 that make up the Facebook Platform, removing public access to over 50 APIs that were widely
28 used by over 40,000 companies in the software industry, including 643. Facebook made these

1 changes under the stated justification that the APIs were “rarely used” in an announcement
2 entitled “The New Login and Graph API 2.0”. It was obvious to me at the time based on nearly a
3 decade of experience in the software industry that this was false and that Facebook was
4 misrepresenting its reasons for making these changes. Facebook subsequently claimed that it had
5 removed these APIs for privacy reasons and (allegedly) to protect its users. Based on my
6 experience in the software industry and my knowledge of other businesses that relied upon
7 Facebook Platform, I strongly suspected that Facebook was in fact the culprit violating user
8 privacy and further that Facebook was managing its Platform as an illegal scheme whereby it
9 represented the Platform as a level competitive playing field available on fair, reasonable and
10 non-discriminatory terms to all companies while secretly causing reliance of tens of thousands of
11 companies on these public representations in order to extract financial consideration from them
12 in a deceptive manner. I suspected that, although Facebook told companies publicly there was no
13 requirement to purchase advertising, that Facebook was secretly shutting companies down
14 unless they did in fact purchase an exorbitant amount of advertising, and that Facebook was
15 blaming companies for Facebook’s own privacy violations in order to get away with this anti-
16 competitive conduct. Thus, companies approached by Facebook who agreed to Facebook’s
17 advertising spend requirements were given special treatment, including obtaining user data
18 without user consent or adherence to privacy controls; those who did not were cut off. Needless
19 to say, 643 was cut off; the larger companies who agreed to Facebook’s arbitrary advertising
20 spending threshold (including, for example, Tinder and Netflix) were not. These facts have all
21 been publicly reported and Facebook has now finally admitted to many of them, like its ongoing
22 use of secretive whitelist agreements to funnel user data to companies without consent (as
23 reported by *The New York Times* on December 18, 2018), but Facebook nonetheless continues to
24 conceal many of these facts from the public, including in testimony provided by Mark
25 Zuckerberg to the United States Congress.

1 6. In light of my strong suspicions surrounding Facebook’s conduct and given that
2 platform economies¹ were relatively novel at the time, I felt it was significantly in the public
3 interest to understand how the Facebook Platform, one of the largest platform economies in the
4 world, was managed and whether Facebook’s internal conduct contradicted its public
5 representations.

6 7. On or about April 2015, 643 was forced to shut down its business due to these
7 very same API changes made under the public name “Graph API 2.0”. Mr. Kramer was upset and
8 approached me about filing a lawsuit against Facebook. I then approached Mr. Godkin at
9 Birnbaum & Godkin as I had a pre-existing attorney-client relationship with him.

10 8. As Mr. Godkin affirmed in Paragraph 6 of his Declaration of June 20, 2017, he
11 explained to me that his law firm was small and had limited resources, particularly compared to
12 the resources Facebook could bring to bear. As a result, I agreed to volunteer a portion of my
13 time to Birnbaum & Godkin as a law clerk and later to study for the California Bar Exam. Mr.
14 Godkin was aware that I had legal training, having obtained my J.D. from Yale Law School in
15 2008 and having served as a law clerk in the United States Attorneys’ Office for the Southern
16 District of New York, in the offices of the Governor of New York, and at the law firm of Davis,
17 Polk & Wardwell. Mr. Godkin and I entered into a formal legal clerkship arrangement whereby I
18 would volunteer my time under Mr. Godkin’s supervision. I have not been compensated in any
19 manner by Birnbaum & Godkin except through the training and education they have provided
20 during my clerkship with them and in the interactions with them and with California local
21 counsel for 643 as I also studied (and ultimately took and passed) the California Bar
22 Examination, as well as the California Ethics Examination. All my activities have been
23 performed under the direct supervision of Mr. Godkin and California local counsel for 643. At all
24 times, any work product developed by me has been reviewed by one or more licensed attorneys
25 and has been incorporated into a final work product authorized and filed by a licensed attorney

26
27 ¹ Platform economies like those managed by Apple, Google, Microsoft and many other
28 technology companies include “collections of economic actors not controlled by the platform
owner...such as the many developers (both individuals and companies) that create apps for
Facebook.” See https://en.wikipedia.org/wiki/Platform_economy#The_platform_business_model

1 who is admitted before this Court and/or who had *pro hac vice* rights granted by this Court. I
2 never signed any pleadings nor made any appearances in any proceedings before this Court on
3 behalf of 643. I did interact with this Court on December 7, 2018, as requested by the Court. I
4 thank the Court for allowing me that opportunity.

5 9. During the course of the litigation, I assisted in the review of Facebook's
6 production and prepared summaries and briefs in a Dropbox folder that I believed was controlled
7 by Birnbaum & Godkin under 643's administrative Dropbox account. This approach was
8 decided upon by the legal team in lieu of permitting me access to the Birnbaum & Godkin file
9 server. Birnbaum & Godkin supervised the transfer of Facebook's documents into this folder. My
10 document review and preparation of summaries was performed under the direction of Birnbaum
11 & Godkin. To the best of my knowledge, 643 and Birnbaum & Godkin took reasonable steps to
12 ensure that Mr. Kramer could not access documents from the Dropbox folder or any of the sub-
13 folders created therein. My placing of documents in that folder, as described in Mr. Godkin's
14 Letter to the Court of November 29, 2018, was in the ordinary course of my work as a law clerk
15 for Birnbaum & Godkin and is a practice I continuously engaged in for approximately two years
16 under the supervision of Birnbaum & Godkin. I was ill and in bed at the time of the events of late
17 November 2018, but nonetheless made my best efforts to assist Birnbaum & Godkin and local
18 counsel once those events transpired in London right before Thanksgiving Day. Until that time, I
19 believed Mr. Kramer did not have access to that Dropbox folder as Birnbaum & Godkin and Mr.
20 Kramer had affirmed to me that Mr. Kramer could not access that folder. To the best of my
21 knowledge, neither Mr. Kramer nor Birnbaum & Godkin believed that Mr. Kramer had access to
22 that Dropbox folder.

23 10. Beyond our control (and certainly beyond my control), it is now apparent as a
24 result of the events at Parliament in London in late November, that at least some of the Dropbox
25 sub-folders did not have the proper permission settings or that the organization of the sub-folders
26 in the Dropbox account was not synced fully with the organization of the folders on the personal
27 computers of the team members who had access to the account, or some other technical issue
28 occurred that modified or undermined what I believed to be the permissions settings which I

1 always understood were limited to the litigation team. I had no responsibility for any settings in
2 Dropbox.

3 11. Since the first Order to Produce Documents issued by the Parliament of the
4 United Kingdom, 643 and the legal team have complied fully with Section 16 of the Protective
5 Order and all other Court Orders in providing immediate notice to Facebook, the Court and
6 Parliament of the conflicting orders and giving Facebook an opportunity to seek timely and
7 reasonable relief in the United Kingdom. Facebook declined to seek such relief. To the best of
8 my knowledge, to this day Facebook still has not sought relief or recourse or done anything
9 whatsoever in Parliament or otherwise in the Courts of the United Kingdom notwithstanding that
10 it maintains a substantial presence and multiple offices in the United Kingdom, including two
11 offices in London at 10 Brock Street and 1 Rathbone Square, which is located just 1.4 miles from
12 the United Kingdom Parliament (<https://www.facebook.com/facebooklondon/>). Why has
13 Facebook taken no action whatsoever? Why did Facebook not have an attorney walk over to
14 Parliament, or at least pick up a phone, the moment it was notified of this issue? Why did
15 Facebook not immediately offer to indemnify and provide for the defense of Mr. Kramer against
16 any actions taken by Parliament against him due to his continued non-compliance with
17 Parliament's Orders? Why has Facebook failed to provide adequate answers to these questions
18 before the Court?

19 12. From the time the Court issued its Order of November 30, 2018 until I was able to
20 retain counsel on December 5, 2018, I was unable to communicate with the Court, had been
21 divorced from the legal team, and had no representation to protect my rights. During this time,
22 the Court ordered all of my files, accounts, computers, phones and hard drives containing all of
23 my personal, financial, medical, marital, corporate and legal records for the past 15 years seized
24 and imaged by Facebook's forensics firm, Stroz Friedberg, including files and accounts owned
25 by my employer, TallyGo, Inc. and files and accounts used to communicate with my current
26 counsel in this matter, Computerlaw Group, and my personal counsel and corporate counsel on
27 unrelated matters.
28

1 13. Further, from November 30, 2018 until December 19, 2018 the Court prohibited
2 me from accessing or using these files and accounts, which has caused substantial harm in the
3 following ways:

- 4 (a) I was unable to communicate with my employees, customers, investors,
5 prospective investors and potential acquirers of my employer, TallyGo,
6 Inc., resulting in substantial harm to the business during a critical period of
7 its development when it was in the final stages of a financing and
8 acquisition process;
- 9 (b) I was unable and remain unable to access the files and communications
10 necessary to defend myself against Facebook's unfounded accusations
11 against me in light of the fact that Facebook repeatedly asserts that
12 information entirely within the public domain is somehow confidential or
13 highly confidential, and therefore I have been required to delete all of my
14 communications with 643 and its legal team;
- 15 (c) I was unable to communicate via email with my personal counsel because
16 the email account I setup to communicate with my personal counsel was
17 also subject to the Court's Order;
- 18 (d) For over two months now, 643 has been unable to obtain any assistance
19 during this collateral litigation, to its great prejudice, because I have been
20 divorced from the case and because 643's counsel have informed the Court,
21 643 and me that they refuse to advocate on behalf of 643;
- 22 (e) 643 has been unable to obtain any assistance from the trial team in multiple
23 pending appeals, to its great prejudice, because I have been divorced from
24 the case and because 643's counsel have informed 643 that they refuse to
25 assist appellate counsel in preparing the appeal; thus, no member of the
26 trial team is available to assist 643's appellate counsel in appeals that
27 require significant evaluation and consideration of the substantive merits
28 and evidence (most of which has been designated confidential or highly

confidential by Facebook) submitted in opposition to two anti-SLAPP motions and a sealing motion;

(f) The files seized by Facebook's forensics firm include files subject to confidentiality in other legal matters unrelated to 643, including a case set for trial this year in Delaware Federal Court in which I am a percipient witness; thus, Facebook's forensics firm is arguably now a third party "in possession" of files that are also subject to a different Protective Order in that case, but Facebook's forensics firm has not signed or otherwise agreed to that separate Protective Order of the Delaware Federal District Court (which means nothing should be accessed until compliance with that Protective Order occurs), unfairly placing me in a situation where another set of lawyers could potentially assert that I am in violation of that Protective Order through no fault of my own;

(g) I have been prohibited from communicating with the media and government officials regarding 643's case against Facebook in violation of my First Amendment rights under the United States Constitution.

14. 643's counsel has informed Facebook's counsel, the Court, me and 643 that the legal team has been disbanded, and thus I am not currently a member of the legal team.

15. I do not currently have access to any of Facebook's confidential or highly confidential documents.

16. Facebook has not served any motion for contempt, sanctions or alternative complaint against me personally, and I am not a party to this case. I did not have any opportunity to be heard prior to the sequence of events that has unfolded since late November and which has substantially impaired my rights and privileges under the law. Facebook has not presented any legitimate evidence of wrongdoing on my part as all of the "evidence" Facebook claims I shared directly with the media and government entities is squarely within the public domain and can be found in the public docket of this case on the San Mateo Superior Court website. The Court has not made any determination of wrongdoing on my part. No other member of the legal team has

1 been subject to a Court order requiring any seizure or imaging of any files, accounts, computers,
2 phones or hard drives.

3 17. As I am not a party to this case, I am unable to file a motion in this Court or seek
4 a writ or appeal in the Appellate Department of the recent Court Orders that have adversely
5 affected my rights. I am informed by Mr. Kramer that 643 has requested that 643's counsel
6 notice an appeal of the recent Court Orders and that 643 submitted advance payment of the filing
7 fee to notice such an appeal, but that 643's counsel has refused to do so. Thus, 643 currently has
8 no ability to seek judicial recourse regarding the recent Court Orders and may waive its rights
9 regarding such to its great prejudice and through no fault of its own.

10 18. I have significant parental duties in the month of February, as I have an 18-month
11 old daughter who requires my care, and I do not have the ability as a co-parent on such short
12 notice to make a trip this month to meet with the Court. I can do so by phone if my participation
13 is required. I have no other knowledge at this time to offer the Court other than what was
14 expressed at the December 7, 2018 hearing and what has been set forth above as I have had no
15 substantive communication with 643's counsel since early December 2018.

16 19. Beyond my personal and family obligations, it is also a substantial burden for me
17 to bear the additional cost of travel to San Francisco for the hearing, as I will lose at least three
18 days of work and will incur at least \$2500 of air travel, lodging, and associated expenses. I fully
19 respect the Court, and I am willing to participate by telephone if my participation is required.

20 20. Beyond the above, I have attempted to assist Mr. Kramer and 643 in its efforts to
21 secure replacement counsel and affirm to the best of my knowledge that 643 is making diligent
22 efforts to secure replacement counsel. 643 has identified a number of firms willing to represent
23 the company on the condition that they are provided adequate time to get up to speed in the case.
24 643 has not found any counsel willing to step in to the case with the prospect of having only a
25 matter of weeks to prepare for the looming terminating sanctions motion and contempt motions
26 Facebook has indicated it intends to file and yet, remarkably, has not filed for months now.

27 21. At the time of the events in the United Kingdom, Facebook's stock price was in
28 the mid-\$130s per share. It is currently around \$170 per share, a roughly 30% increase. Thus, I

1 struggle to see what irreparable damage has been caused to Facebook requiring immediate relief
2 and warranting these repeated cycles of costly activity in a case otherwise stayed and in the
3 absence of Facebook noticing any motion for contempt or sanctions whatsoever.

4 22. I believe 643's request that it have until May 31, 2019 to find replacement
5 counsel is reasonable and that 643 is likely to secure replacement counsel if it can guarantee to
6 such counsel adequate time to prepare for Facebook's pending motions.

7 23. If allowed and if I can find the time to do so, I will continue diligent efforts to
8 assist 643 in its attempt to retain replacement counsel. In the meantime, I believe 643's current
9 counsel should remain responsible for managing the electronically stored information ("ESI") on
10 cloud accounts pending new counsel appearing on its behalf.

11 24. I understand it to be 643's position (and I certainly am not in control of it but
12 believe it to be true) that requiring 643's current legal counsel, including its local counsel, to
13 remain in the case notwithstanding their continued refusal to advocate on behalf of 643 has
14 resulted in and will continue to result in great prejudice and injustice to 643, including the
15 continued failure of 643 to file any briefs in accordance with the briefing schedule set by the
16 Court, including the briefing schedule set forth in the Court's Order of January 24, 2018.

17 25. I respectfully request that the Court allow me to be represented by Mr. Russo and
18 his firm at subsequent hearings, including the hearing scheduled for February 22, 2018 or, in the
19 alternative, that the Court permit me to use phone conferencing to join any hearings in which the
20 Court requires my participation. I simply cannot travel to California this month.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct and that this declaration was entered into on February 6, 2019 in
23 Forestburgh, New York.

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Thomas Scaramellino